

The Appeals Board has adopted the stipulations listed in the Award. Additionally, on August 18, 1998, the parties filed a stipulation agreeing that claimant's post-injury average weekly wage at Family Dollar store was \$388.58. The Administrative Law Judge did not list this under the stipulations in the Award. But the Administrative Law Judge did reference the post-injury average weekly wage stipulation of \$388.58 in his findings on page 5 of the Award.

ISSUES

The Administrative Law Judge found claimant had failed to prove the work task loss component of the work disability test.¹ But he found for certain periods after claimant's May 9, 1997, accident, that claimant was temporarily and totally disabled; had been paid additional temporary total disability benefits while participating in a supervised job placement plan; was entitled to either permanent partial general disability compensation based only on the wage loss component of the work disability test; or entitled to permanent partial disability compensation based on his functional impairment rating.

Claimant appealed and contends he is entitled to a higher work disability award. First, claimant argues he proved the lost work tasks component of the work disability test through the testimony of his treating physician, Robert L. Eyster, M.D. Second, he claims the stipulated post-injury average weekly wage of \$388.58 includes a temporary excessive amount of overtime. Accordingly, the claimant argues that the correct post-injury average weekly wage should be computed without the excessive amount of overtime and equals \$308 per week. Since \$308 is not 90 percent or more of his pre-injury average weekly wage of \$408.07, claimant asserts that he is entitled to a work disability award after he started to work for the Family Dollar store on June 12, 1998.

Respondent contends that the Administrative Law Judges's findings that claimant failed to prove a work task loss and that claimant's post-injury average weekly wage is \$388.58 as stipulated by the parties should be affirmed. But the respondent disagrees with the Administrative Law Judge that for certain weekly periods before claimant started working for the Family Dollar store on June 12, 1998, he is entitled to a work disability. Respondent argues that claimant failed to make a good faith effort to find appropriate employment and is not entitled to a work disability for those particular periods.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

¹ On claimant's date of accident, May 9, 1997, the work disability test was the extent, expressed as a percentage, to which the employee, in the opinion of the physician, had lost the ability to perform work tasks in the jobs he was employed during the 15-year period preceding the accident, averaged together with the difference between the employee's pre-injury average weekly wage and his post-injury average weekly wage. See K.S.A. 1996 Supp. 44-510e(a).

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Post-Injury Average Weekly Wage

The Appeals Board concludes that the Administrative Law Judge's findings in regard to claimant's post-injury average weekly wage of \$388.58 should be affirmed. Therefore, after claimant started working for the Family Dollar store on June 12, 1998, he was earning 90 percent or more of his stipulated pre-injury average weekly wage of \$408.07 and is not entitled to a work disability.² If claimant's average weekly earnings subsequently change, he may file for review and modification of this award.

The Administrative Law Judge's findings and conclusions concerning this issue are adopted by the Appeals Board as it's own.

Good Faith Effort to Find Employment

Likewise, the Appeals Board concludes that the Administrative Law Judge's finding that claimant, with the exception of January and February 1998, made a good faith effort to find appropriate employment after respondent terminated claimant on September 15, 1997, because respondent could not accommodate claimant's permanent restrictions also should be affirmed.³ The claimant admitted he did not look for employment in January or February of 1998 because of personal problems.

The Administrative Law Judge's findings and conclusions concerning this issue are also adopted by the Appeals Board as its own.

Work Task Loss

For reasons stated below, the Appeals Board concludes that claimant proved a work task loss and claimant is entitled to permanent partial general disability benefits based on a work disability that varies as to percentage depending on whether claimant was earning wages or not and whether claimant was making a good faith effort to find appropriate employment.

²See K.S.A. 1996 Supp. 44-510e(a).

³Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Claimant suffered a low-back injury while employed by the respondent on May 9, 1997. Respondent provided medical treatment for claimant's injury primarily through orthopedic surgeon Robert L. Eyster, M.D. Dr. Eyster first saw claimant on May 23, 1997. The doctor diagnosed a bulging lumbar disc. He prescribed a home exercise program.

On July 2, 1997, Dr. Eyster determined that claimant had met maximum medical improvement and released claimant with permanent restrictions and a 1 percent permanent functional impairment rating. But after claimant completed a Functional Capacity Evaluation, Dr. Eyster saw claimant again on November 4, 1997. At that time, Dr. Eyster referred claimant for physical therapy and continued to prescribe the home exercise program. Finally, on December 2, 1997, the doctor released claimant to return to work and imposed permanent restrictions of no single lift over 100 pounds; no repetitive lift over 40 pounds; and no repetitive bending or twisting over 25 times per hour. Claimant's permanent functional impairment remained at 1 percent.

Respondent could not accommodate claimant's restrictions, except for a brief period from August 18, 1997, through September 14, 1997, when claimant performed some clerical work. Respondent then terminated claimant on September 15, 1997.

At claimant's attorney's request, vocational expert Karen Crist Terrill interviewed claimant and developed a list of work tasks claimant had performed from the time he had started working in 1991 until his May 9, 1997, work accident. Based on Dr. Eyster's permanent restrictions, Ms. Terrill found claimant was not able to perform 15 of the 24 work tasks he was able to perform before his May 9, 1997, accident.

K.S.A. 1996 Supp. 44-510e(a) requires the work task loss component of the work disability test to be in the opinion of the physician. Therefore, claimant's attorney gave Dr. Eyster an opportunity before his May 7, 1998, deposition to review Ms. Terrill's work task loss analysis. During the deposition, claimant's attorney asked Dr. Eyster, if he agreed with the work task loss that Ms. Terrill had indicated claimant had sustained based on the permanent restrictions imposed by Dr. Eyster. Dr. Eyster replied, the activities Ms. Terrill identified that the claimant could no longer perform were duties that would cause claimant some irritation and if claimant wanted to work pain-free, he should not perform those tasks repeatedly or have them modified. Claimant's attorney went on to ask Dr. Eyster, if claimant were to perform the tasks Ms. Terrill indicated he should not perform, would this caused claimant pain and would this place claimant at greater risk for future injury. Dr. Eyster replied "Yes".

The respondent argues and the Administrative Law Judge found that claimant had failed to prove he suffered a work task loss through the testimony of Dr. Eyster. The

Appeals Board disagrees and finds that when Dr. Eyster's testimony is taken as a whole he does adopt Ms. Terrill's work task loss opinion. The Appeals Board has previously held that it is not necessary that the physician actually do the math and state the percentage of the work task loss.⁴ The Appeals Board interprets Dr. Eyster's testimony to mean that it is possible that claimant could do some of the work tasks that Ms. Terrill indicated that he should not do because of the permanent restrictions. But Dr. Eyster went on to testify that if claimant would perform those tasks then he would have pain and he would place himself in greater risk of injury. The Appeals Board finds it is reasonable to conclude that permanent restrictions are imposed to protect injured persons from pain and further injury. Depending on certain factors such as weight, body position, or frequency of performing a certain work task, an injured worker could possibly perform that work task, even if it is outside his permanent restrictions, but if he did, it could cause him pain, discomfort, and risk of further injury.

Accordingly, the Appeals Board concludes that Dr. Eyster adopted Ms. Terrill's opinion that based on the permanent restrictions imposed by Dr. Eyster, claimant has a 63 percent work task loss.

Claimant's Entitlement to Temporary Total Disability and Permanent Partial Disability Benefits

The Appeals Board finds the record has established that claimant's entitlement to temporary total disability compensation and permanent partial disability compensation varies for certain periods from his date of accident of May 9, 1997, until he started to work for Family Dollar store on June 12, 1998. Depending on certain findings, such as whether claimant was temporarily and totally disabled; the amount claimant earned post-injury; or whether claimant made a good faith effort to find employment, claimant's entitlement to temporary total disability benefits and permanent partial disability benefits are found as follows:

- (1) From May 10, 1997, through June 29, 1997, claimant was paid 7.22 weeks of temporary total disability compensation at \$272.06 per week or \$1,964.27.
- (2) From June 30, 1997, through August 17, 1997, the date respondent returned claimant to a part-time clerical position, the record does not contain evidence of whether or not claimant made a good faith effort to find appropriate employment. Therefore, the

⁴See *Smith v. Valley Pro Source*, Docket No. 199,793 (November 1996)

Appeals Board finds claimant is entitled to his 1 percent functional impairment for this period or 4.15 weeks of permanent partial disability compensation at \$272.06 per week or \$1,129.05.

(3) From August 18, 1997, through August 24, 1997, claimant worked for respondent at a clerical position and earned \$207.75. Claimant is entitled to 1 week of permanent partial disability compensation at \$272.06 for a 56 percent work disability (49 percent wage loss averaged with a 63 percent task loss).

(4) From August 25, 1997, through August 31, 1997, claimant earned \$65.65 while working for respondent. Claimant is entitled to 1 week of permanent partial disability compensation at \$272.06 per week for a 74 percent work disability (84 percent wage loss averaged with a 63 percent task loss).

(5) From September 1, 1997, through September 7, 1997, claimant earned \$139.61 working for respondent. Claimant is entitled to 1 week of permanent partial disability compensation at \$272.06 per week for a 65 percent work disability (66 percent wage loss averaged with a 63 percent task loss).

(6) From September 8, 1997, through September 14, 1997, claimant earned \$97.23 working for respondent. Claimant is entitled to 1 week of permanent partial disability compensation at \$272.06 per week for a 70 percent work disability (76 percent wage loss averaged with a 63 percent task loss).

(7) From September 15, 1997, through December 31, 1997, claimant made a good faith effort to find employment. Claimant is entitled to 15.43 weeks of permanent partial disability compensation at \$272.06 per week or \$4,197.89 for an 82 percent work disability (100 percent wage loss averaged with a 63 percent task loss).

(8) From January 1, 1998, through February 28, 1998, claimant did not make a good faith effort to find employment. Therefore, a \$240 per week wage should be imputed. Claimant is entitled to 8.43 weeks of permanent partial disability compensation at \$272.06 or \$2,293.47 for a 52 percent work disability (41 percent wage loss averaged with a 63 percent task loss).

(9) From March 1, 1998, through March 14, 1998, claimant made good faith effort to find employment. Claimant is entitled to 2 weeks of permanent partial disability compensation at \$272.06 per week or \$544.12 for a 82 percent work disability (100 percent wage loss averaged with 63 a percent task loss).

(10) From March 15, 1998, through April 30, 1998, claimant worked for Domino's Pizza. Claimant is entitled to 6.57 weeks of permanent partial disability at \$272.06 or \$1,787.43 for a 57 percent work disability (50 percent wage loss [found by averaging the two week wage statement contained in the records of \$229.44 and \$180 per week] averaged with a 63 percent task loss).

(11) From May 1, 1998, through June 11, 1998, respondent paid claimant 6 weeks of temporary total disability compensation at the rate of \$272.06 or \$1,632.36 while claimant was participating in a job placement program.

(12) On June 12, 1998, claimant was employed by Family Dollar store at the stipulated post-injury average weekly wage of \$388.58 which is 90 percent or more of claimant's pre-injury average weekly wage of \$408.07. Therefore, in accordance with K.S.A. 1996 Supp. 44-510e(a), claimant would be entitled to his function impairment of 1 percent or 4.15 weeks. But the respondent is entitled to a credit for the permanent partial disability weeks previously paid. As noted above, respondent has already paid more than 4.15 weeks of permanent partial disability. Accordingly, at this time claimant is not owed any additional weeks of disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bruce E. Moore's September 25, 1998, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Brian Larson, and against the respondent, a qualified self-insured, Dillon Companies, for an accidental injury which occurred on May 9, 1997, and based upon an average weekly wage of \$408.07.

Claimant is entitled to 7.22 weeks of temporary total disability compensation at the rate of \$272.06 per week or \$1,964.27, followed by 4.15 weeks of permanent partial disability compensation at the rate of \$272.06 per week or \$1,129.05 for a 1% permanent partial general disability, followed by 1 week of permanent partial disability compensation at the rate of \$272.06 per week or \$272.06 for a 56% permanent partial general disability, followed by 1 week of permanent partial disability compensation at the rate of \$272.06 per week or \$272.06 for a 74% permanent partial general disability, followed by 1 week of permanent partial disability compensation at the rate of \$272.06 per week or \$272.06 for a 65% permanent partial general disability, followed by 1 week

of permanent partial disability compensation at the rate of \$272.06 per week or \$272.06 for a 70% permanent partial general disability, followed by 15.43 weeks of permanent partial disability compensation at the rate of \$272.06 per week or \$4,197.89 for a 82% permanent partial general disability, followed by 8.43 weeks of permanent partial disability compensation at the rate of \$272.06 per week or \$2,293.47 for a 52% permanent partial general disability, followed by 2 weeks of permanent partial disability compensation at the rate of \$272.06 per week or \$544.12 for a 82% permanent partial general disability, followed by 6.57 weeks of permanent partial disability compensation at the rate of \$272.06 per week or \$1,787.43 for a 57% permanent partial general disability, followed by 6 weeks of temporary total disability compensation at the rate of \$272.06 per week or \$1,632.36. Commencing June 12, 1998, claimant is entitled to a 1% permanent partial disability which has been previously paid making a total award of \$14,636.83 which is all due and owing to claimant and is ordered paid in one lump sum, less any amounts previously paid.

The Appeals Board approves and adopts all remaining orders contained in he Award.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS
Scott J. Mann, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director